STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal From the Michigan Court of Appeals

ESTATE OF DANIEL CAMERON, by
DIANE CAMERON and JAMES CAMERON,
Co-Guardians,

Docket No. 127018

Plaintiff-Appellant,

v.

AUTO CLUB INSURANCE ASSOCIATION,
a Michigan corporation, et al.,

Defendant-Appellee.

/

SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION

Jill M. Wheaton (P49921)
Joseph Erhardt (P44351)
DYKEMA GOSSETT PLLC
2723 S. State St., Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

Attorneys for the Michigan Catastrophic Claims Association

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Rules and Statutes

COUNTER-STATEMENT OF QUESTION INVOLVED

DOES THE MINORITY SAVINGS PROVISION OF THE REVISED JUDICATURE ACT APPLY TO TOLL THE NO-FAULT ACT'S ONE-YEAR BACK RULE REGARDING DAMAGES SUCH THAT WHEN SUIT IS BROUGHT BY OR ON BEHALF OF MINORS OR THE MENTALLY INCOMPETENT, THEY, UNLIKE OTHER PLAINTIFFS, MAY COLLECT BENEFITS FOR COSTS INCURRED YEARS, IF NOT DECADES, BEFORE SUIT WAS FILED?

Defendant-Appellee would answer:	No
Amicus Curiae the MCCA would answer:	No
Plaintiffs-Appellants would answer:	Yes
This Court should answer:	No

ARGUMENT

The Michigan Catastrophic Claims Association ("MCCA") has previously filed an *amicus curiae* brief in this matter in support of Defendant-Appellee Auto Club Insurance Association. The MCCA submits this supplemental brief in response to this Court's February 2, 2006 Order inviting the *amicus curiae* to brief the issue of "whether the provisions of MCL 600.5851(1) apply to the 'one year back rule' of MCL 500.3145(1)." The MCCA agrees with Appellee Auto Club that it does not, as set forth more fully below.

I. THE PLAIN LANGUAGE OF THE STATUTE AT ISSUE MAKES CLEAR THAT THE ONE YEAR BACK RULE IS A DAMAGES LIMITATION THAT IS NOT SUBJECT TO TOLLING.

This Court is now reviewing the applicability of the savings provision of the Revised Judicature Act ("RJA") to the "one year back rule" of the No-Fault Act. The savings provision states in pertinent part:

> [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. . . .

MCL 600.5851(1). The one-year-back rule states, in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. . . .

MCL 500.3145(1) (emphasis added).

To date, this case has focused on whether the RJA savings provision applies to toll the one year statute of limitations contained in the No-Fault Act where, as here, the Plaintiff is a minor. The Court of Appeals held that it does not, as the savings provision, by its terms, applies only to actions brought under the RJA itself and not under other statutes, such as the No-Fault Act. This Court posited at oral argument whether, even if the savings provision operated to toll the No-Fault statute of limitations (thus allowing a minor or mentally incompetent to bring suit under the No-Fault Act more than one year after the accident), the Plaintiff would nonetheless be limited to recovering only those losses incurred within the one year prior to suit being filed. The MCCA believes that this interpretation is correct, and indeed, is required by both the plain language of the statute and the policy behind the No Fault Act.

It is a fundamental rule that where the language of a statute is unambiguous, "judicial construction is neither necessary nor permitted." *Griffith v State Farm Mutual Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005), citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Both the savings provision and the one-year-back-rule are plain on their face. The savings provision states nothing whatsoever about tolling or negating damages limitations in suits brought by persons for whom the statute of limitations had been tolled pursuant to the RJA provision. And the one-year-back rule clearly states that claimants "may not" recover PIP benefits "incurred more than 1 year before the date on which the action was commenced". The Legislature could not have been more clear.

This Court addressed this very issue just eight months ago in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), in which it overruled *Lewis v DAIEE*, 426 Mich 93; 393 NW2d 167 (1986), which had applied the doctrine of judicial tolling to the one-year-

back damages limitation.[1] The Court first specifically noted that Section 3145(1) contains both time limitations for filing suit and a limitation "on the period for which benefits may be recovered." *Id.* at 574, citing *Welton v Carriers Ins Co*, 421 Mich 571; 365 NW2d 170 (1985).[2] This Court then held that MCL 500.3145(1) "clearly and unambiguously states that a claimant 'may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced'" and overruled *Lewis* because it "contravenes this plain statutory directive" of Section 3145(1). *Devillers,* 473 Mich at 564.

This Court could not have been more clear in its holding that the one-year back damages limitation is clear and without exception. Specifically, the Court stated that:

- *Lewis* impermissibly superseded "the plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit." *Id.* at 582-83.
- "Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court." *Id.* at 582.
- *Lewis* demonstrated "judicial defiance" by the Court substituting its own judgment concerning "fairness" for "the plainly expressed will of the Legislature." *Id.* at 585.
- the "one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written." *Id.* at 586; and

[1] Specifically, *Lewis* had adopted a rule that the one-year back damages limitation was tolled from the time the insured made a specific claim for benefits until the date that liability was formally denied. 426 Mich at 101.

[2] Plaintiff completely ignores *Devillers* in his supplemental brief (incredibly never even acknowledging its existence) and argues that the statute "is dealing with notice and limitations of action not a damages cap or limit to any damages [sic]" (Plaintiff's Supplemental Brief at p.2.) However, Plaintiff then states – in the very same paragraph – that the No-Fault Act needed a one year back rule to "deal with the competent adult" who could otherwise "seek benefits many years back". *Id.* Plaintiff therefore clearly concedes that Section 3145(1) contains a damages cap, but argues, without citing to any language in the Act or any other authority in support of its theory, that the cap does not apply in certain cases or to certain plaintiffs.

- "*Lewis* is an anomaly that, for the first time, engrafted onto the text of § 3145 (1) a tolling clause that has absolutely no basis in the text of the Statute." *Id.* at 588.

The Court also noted that No-Fault claimants had profited from *Lewis* by receiving "a windfall in being permitted to collect benefits that the statute proclaims are nonrecoverable." *Id.* at 585. Plaintiff in this case is seeking precisely such a windfall for all persons who provided care to minors or otherwise incompetent persons injured in auto accidents.

This Court put it best in *Devillers* when it said "we are unable to perceive any sound policy basis for the adoption of a tolling mechanism with respect to the one-year-back rule." *Id.* at 583. Surely if this Court could perceive no "sound basis" for the adoption of a *judicial tolling mechanism* to the one-year-back rule, which allowed for the recovery of losses incurred during the time period in which the insurer was determining a claim for benefits, there is no sound basis for the adoption of *the tolling mechanism set forth in the RJA, which mentions neither the No-Fault Act nor damages limitations,* to the one-year-back rule. The No-Fault Act plainly limits all plaintiffs, regardless of their status and regardless of whether or why the statute of limitations was tolled, to the recovery of benefits for losses incurred within the one year prior to suit being filed.

II. THE DAMAGES CAP IS CONSISTENT WITH THE GOALS OF THE NO-FAULT ACT AND A FAILURE TO APPLY THE CAP IN ALL CASES WILL HARM THE INSURANCE BUYING PUBLIC.

As discussed in detail in the MCCA's earlier *amicus* brief, it cannot be disputed that one primary goal of the Michigan No-Fault system is cost containment, for both healthcare costs and insurance premiums. (*See* cases cited at MCCA brief, pp. 9-10.) As is also discussed in the MCCA's earlier brief, when the MCCA's costs increase, this directly causes an increase in the costs to Michigan drivers for auto insurance. (*See* MCCA brief at pp. 2-5.) The purpose of the one-year-back rule is "to encourage claimants to bring their claims to court while those claims

are still fresh". *English v Home Ins Co*, 112 Mich App 468, 474; 316 NW2d 463 (1982). *See also, Pendergast v American Fidelity Fire Ins Co*, 118 Mich App 838, 841-42; 325 NW2d 602 (1982) ("the statute attempts to protect against stale claims and protracted litigation").

To allow minors and the mentally incompetent to recover benefits for losses incurred and services rendered years, if not decades, before their suit was filed, would both thwart these policy goals and result in Michigan drivers paying higher premiums. Specifically, most cases involving payment for care provided to catastrophically injured minors involve attendant care provided by family members around the clock, every day of the year. The MCCA documents attached as Exhibit B to the MCCA's earlier brief reveal that of 500 claims for reimbursement submitted by member insurers in 2004, 25.6% of the reimbursement funds paid by the MCCA were for in-home attendant care provided by family members of the accident victim. This number has greatly increased over time. MCCA members believe this is due in part to the courts' failure in the past to enforce the one-year-back damages limitation as it is clearly written. (*See, e.g., Geiger v DAIIE*, 114 Mich App 283; 318 NW2d 833 (1982).)

A failure to enforce the one year back damages limitation in each and every case, regardless of whether the time for filing same was tolled for one or another reason, will virtually guarantee an increase in the amount of cases that require reimbursement by the MCCA. Consider the financial implications of just one typical case -- if a provider seeks, and is entitled to receive, $20 per hour (a lesser amount than that sought by many claimants) for attendant care provided to an injured minor for 10 years, that comes to $1.75 million in attendant care benefits that must be paid by the insurer (assuming the charges are reasonable and otherwise permitted under the No-Fault Act) in that one case alone. To allow minors (or in this case, the parents of an injured minor) to go back and seek benefits for up to 19 years worth of care (or the mentally

incompetent for possibly even longer periods of time), will unquestionably result in each such case reaching the MCCA reimbursement threshold, which will cause an increase in MCCA assessments, and thus, an increase in the costs of auto insurance for the Michigan public.

This Court noted in *Devillers* that the impact of judicial tolling as provided for by *Lewis* "is increasingly producing a tax on the no-fault system as claimants are being permitted to seek recovery for losses incurred much more than one year prior to commencing suit. Thus, far from 'producing chaos', overruling *Lewis* will *prevent* potential chaos by according insurers, and the public that funds the no-fault system through payment of premiums, the certainty that the Legislature intended." *Devillers* at 586. The same logic applies to the tolling or lifting of the damages limitation sought by Plaintiffs in the instant case. To accept Plaintiff's argument is to not only ignore the plain language of both statutes, but to invite chaos.

Further, in order to fund its reimbursement obligations, the MCCA imposes charges on its members, which consist of both the pure premium, reflecting the charge to cover the MCCA's expected losses and expenses for occurrences during the assessment period, and an adjustment to account for excess or deficient assessments from prior periods. MCL 500.3104(7)(d). To the extent attendant care costs and other bills paid on a claim increase significantly, both components of the assessment charge will increase. The expected losses for the assessment period will be higher, resulting in increased pure premiums, and an adjustment will likely be necessary due to deficient reserves. Indeed, once again, this Court honed in on this very issue in *Devillers*, noting that application of the judicial tolling doctrine to the one-year-back rule would cause unpredictability and therefore "increase overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk." *Devillers* at 589.

Finally, as discussed above and as the Court is well aware, the MCCA assessments are passed along in the rates charged by insurers to their policyholders. To judicially create an exception to the one year back rule for a large class of claimants will have far reaching implications, ultimately forcing Michigan drivers to pay even more for automobile insurance, in order to pay a provider who sat on his or her rights for reimbursement for years, simply because they could due to the status (minor or incompetent) of the person for whom they provided care. Such a result is inconsistent with both the statutory language and the public policy behind the No-Fault Act and should not be undertaken by this Court.

DYKEMA GOSSETT PLLC

By: Jill M. Wheaton

Jill M. Wheaton (P49921)
Joseph Erhardt (P44351)
Attorneys for Defendant
Dykema Gossett PLLC
2723 South State Street, Suite 400
Ann Arbor, MI 48104
(734) 214-7629

Attorneys for the Michigan Catastrophic
Claims Association

Dated: March 22, 2006

<sp>

AA01\168868.1
ID\JMW